EXERCISE OF THE EXECUTIVE OVERRIDE UNDER SECTION 53 OF THE FREEDOM OF INFORMATION ACT 2000

IN RESPECT OF A JUDGMENT OF THE UPPER TRIBUNAL DATED 18 SEPTEMBER 2012 (EVANS v (1) INFORMATION COMMISSIONER (2) SEVEN GOVERNMENT DEPARTMENTS [2012] UKUT 313 (AAC))

STATEMENT OF REASONS
(under section 53(6) of the Freedom of Information Act)

INTRODUCTION

1. Pursuant to section 53 of the Freedom of Information Act 2000 ("the Act") and regulation 18(6) of the Environmental Information Regulations 2004, I have today signed a certificate in respect of the Upper Tribunal's decision contained in a judgment dated 18 September 2012, and the conditionally suspended annex to that judgment dated 12 October 2012 (*Evans v (1) Information Commissioner (2) Seven Government Departments* [2012] UKUT 313 (AAC), "*Evans*"). That judgment found that the government departments had failed to comply with their obligations under the Act and Regulations in refusing to disclose various letters between The Prince of Wales and Ministers in seven government departments ("the Departments"). In reaching this decision, I have taken account of the views of Cabinet, former Ministers and the Information Commissioner.

2. It is my opinion as the accountable person in this case, that the decisions taken by the Departments not to disclose those letters in response to the relevant requests were fully in accordance with the provisions of the Freedom of Information Act and the Environmental Information Regulations 2004. Disclosure of any part of those letters was not required having regard to the balance of the public interests in disclosure and those against. I also believe

that this is an exceptional case warranting my use, as a Cabinet Minister, of the power in section 53(2) of the Act. Accordingly, I have today given the certificate required by section 53(2) to the Information Commissioner.

3. In accordance with section 53(3)(a) of the Act, I am also today laying a copy of that certificate before both Houses of Parliament, together with a copy of this statement of reasons.

ANALYSIS

The Upper Tribunal's judgment

4. The Upper Tribunal's judgment concerned requests under the Act, and the Environmental Information Regulations for disclosure of correspondence between The Prince of Wales and Ministers in the Departments for the period between 1 September 2004 and 1 April 2005. The Departments turned down the requests, and the Information Commissioner upheld the Departments' decisions. In broad terms, the Upper Tribunal allowed appeals against those decisions. It ordered the Departments to disclose 27 of the 30 items of correspondence which it found to be within the scope of the requests. Those 27 items of correspondence fell into a category which the Tribunal described as "advocacy correspondence".

5. In summary, the Upper Tribunal concluded as follows.

   (1) All of the non-environmental information in the correspondence fell within the qualified exemption in section 37(1)(a) of the Act (information relating to communications with members of the Royal Family). However, the bulk of that information consisted of correspondence in which The Prince of Wales was urging a particular view upon Ministers (which the Tribunal called "advocacy correspondence"). The Tribunal concluded that the public interest was strongly in favour of the disclosure of such correspondence.

(2) Most of the non-environmental information also fell within the exemption in section 41 of the Act (information provided in confidence). Section 41 provides an absolute exemption from the duty to disclose, but does not apply where there would be a public interest defence to any action for breach of confidence. The Upper Tribunal found that in this case, there would be a public interest defence to disclosure of "advocacy correspondence", because of a strong public interest in its disclosure.

(3) The Tribunal did not need to consider whether the correspondence was covered by section 40 of the Act (exemption for personal data), because (it concluded) given the strong public interest in disclosure of "advocacy correspondence" it would not be contrary to data protection principles to disclose it.

(4) Significant parts of the correspondence consisted of environmental information (as defined for the purposes of the Environmental Information Regulations 2004 – the "EIR"), and were accordingly properly dealt with under the EIR rather than the Act. For those parts of the correspondence, the Tribunal proceeded on the basis that regulation 12(5)(f) EIR was engaged (the equivalent exemption for environmental information to section 41 of the Act for non-environmental information). However, for the same reasons as the Tribunal gave in respect of section 41 of the Act regulation. 12(5)(f) EIR could not be relied upon to withhold "advocacy correspondence". The Tribunal did not go on to consider whether regulation 13 EIR was engaged (the equivalent exemption for environmental information to section 40 of the Act for non-environmental information).

The public interests in not disclosing and maintaining the exemptions

6. Within a constitutional monarchy, where the Sovereign is Head of State but political power is exercised through a democratically elected government, it is

a vital feature of the constitutional settlement that the Sovereign cannot be seen to favour one political party above another, or to engage in political controversy. Without that preservation of political neutrality, the constitutional balance that allows for governments to be elected within the framework of inherited monarchy could not be preserved. Nor would it be possible for the Sovereign to fulfil his or her symbolic function as representative of the State.

7. In the United Kingdom, that constitutional balance is preserved by the constitutional convention that the Monarch acts on, and uses prerogative powers consistently with, Ministerial advice ("the cardinal convention"). The corollary to the cardinal convention is the convention that the Monarch has the right, and indeed the duty, to be consulted, to encourage, and to warn the government (the "tripartite convention"). The tripartite convention ensures that a measure of influence is retained for the Monarch within the constitution. The tripartite convention is most obviously, though not solely, expressed through the Prime Minister's weekly audience with the Monarch.

8. In order to prepare for the exercise of the tripartite convention, the heir to the Throne has the right to be instructed in the business of government: a right described by the Tribunal in this case as the "education convention". The Tribunal in this case accepted the importance of the education convention; and accepted that it carried with it a duty of confidentiality. However, the Tribunal concluded both that "advocacy correspondence" was outside the education convention; and that such correspondence formed no part of The Prince of Wales' preparations for kingship, because it was not undertaken as part of preparation for kingship, and was not the type of activity in which the Monarch would engage.

9. In my view, it is of very considerable practical benefit to The Prince of Wales' preparations for kingship that he should engage in correspondence and engage in dialogue with Ministers about matters falling within the business of their departments, because such correspondence and dialogue will assist him in fulfilling his duties under the tripartite convention as King. Discussing matters of policy with Ministers, and urging views upon them, falls within the

ambit of "advising" or "warning" about the Government's actions. It thus entails actions which would (if done by the Monarch) fall squarely within the tripartite convention. I therefore respectfully disagree with the Tribunal's conclusion that "advocacy correspondence" forms no part of The Prince of Wales' preparations for kingship. I consider that such correspondence enables The Prince of Wales better to understand the business of government; strengthens his relations with Ministers; and enables him to make points which he would have a right (and indeed arguably a duty) to make as Monarch. It is inherent in such exchanges that one person may express views and urge them upon another. I therefore consider that, whether or not it falls within the strict definition of the education convention, "advocacy correspondence" is an important means whereby The Prince of Wales prepares for kingship. It serves the very same underlying and important public interests which the education convention reflects.

10. If such correspondence is to take place at all, it must be under conditions of confidentiality. Without such confidentiality, both The Prince of Wales and Ministers will feel seriously inhibited from exchanging views candidly and frankly, and this would damage The Prince of Wales' preparation for kingship. Indeed, it is difficult to see how the exchange of views in correspondence could continue at all without confidentiality. Also, The Prince of Wales is party-political neutral. Moreover, it is highly important that he is not considered by the public to favour one political party or another. This risk will arise if, through these letters, The Prince of Wales was viewed by others as disagreeing with government policy. Any such perception would be seriously damaging to his role as future Monarch, because if he forfeits his position of political neutrality as heir to the Throne, he cannot easily recover it when he is King. Thus in this context, confidentiality serves and promotes important public interests.

11. I also consider that the disclosure of "advocacy correspondence" engages the important freestanding interest in the preservation of confidences. Both The Prince of Wales, and Ministers, correspond on the basis that their exchanges are strictly confidential. Furthermore, I consider that the public interest in maintaining confidentiality will be buttressed where The Prince of Wales's

letters reflect his personal and deeply held views and convictions, given under impress of confidentiality.

12. In my view, these are important public interests in non-disclosure, which will generally apply to "advocacy correspondence" between The Prince of Wales and Ministers. Of course, I recognise that each case must be decided on its own particular facts, so I have gone on to examine how those public interests apply in this case. I take the view that they apply with particular force, in circumstances where:

    (1) The requests were made in April 2005. Thus, at the time when the requests fell to be responded to, the correspondence was very recent; and it is still relatively recent.

    (2) Much of the correspondence does indeed reflect The Prince of Wales' most deeply held personal views and beliefs.

    (3) The letters in this case are in many cases particularly frank. They also contain remarks about public affairs which would in my view, if revealed, have had a material effect upon the willingness of the government to engage in correspondence with The Prince of Wales, and would potentially have undermined his position of political neutrality.

    (4) There is nothing improper in the nature or content of the letters.

The public interests in disclosure

13. I recognise, and take account of, the public interests in disclosure identified in the Upper Tribunal's judgment, namely governmental accountability and transparency; the increased understanding of the interaction between government and Monarchy; a public understanding of the influence, if any, of The Prince of Wales on matters of public policy; an interest in disclosure in light of media stories focusing on The Prince of Wales' alleged inappropriate interference, or lobbying; furthering the public debate regarding the constitutional role of the Monarchy, and in particular the heir to the Throne; and informing broader debate surrounding constitutional reform.

14. In my view, the factors in favour of disclosure identified by the Tribunal in this case are good generic arguments for disclosure of the information. However, if they were decisive in the present case it would have to be at the expense of the strong public interest arguments against disclosure, centred upon The Prince of Wales' preparation for kingship and the importance of not undermining his future role as Sovereign.

15. I also consider that the very high public interest that the Tribunal identified in the public knowing what The Prince of Wales said to Ministers was at least in part dependent upon the Tribunal's assumption that The Prince of Wales was in no different position from any other lobbyist, when making representations to Ministers, save that he did so from a position where his representations would be accorded special weight. I do not consider that The Prince of Wales's correspondence is properly viewed in that light, in circumstances where it is part of his preparation for kingship. I take the view that the correspondence has a constitutional function, which makes any analogy between it and correspondence between a private individual and a Minister inapposite.

How those public interests relate to applicable exemptions in the Act and the EIR

16. I take the view that, for the reasons I have set out above, the public interests in non-disclosure of the disputed information in this case substantially outweigh the public interests in its disclosure.

17. In those circumstances, I conclude that all the non-environmental information in the correspondence falls within the exemption in section 37(1) of the Act for information relating to members of the Royal Family (as it applies to requests made prior to 19 January 2011); and that the public interest in maintaining the exemption outweighs the public interest in disclosure.

18. I also conclude (to the extent necessary) that the non-environmental information in the correspondence is exempt from disclosure under the absolute exemptions in sections 40 and 41 of the Act. In particular:

(1) The information is personal data relating to The Prince of Wales for the purposes of section 40 of the Act. Its disclosure would breach data protection principles, because it would be unwarranted by reason of prejudice to The Prince of Wales's rights, freedoms and legitimate interests, for the same reasons I have set out above. In those circumstances, the information is exempt from disclosure under section 40; and

(2) The information consists of confidential information obtained from The Prince of Wales. The disclosure of the information otherwise than under the Act would constitute an actionable breach of confidence, because against the public interests I have outlined above, there would be no public interest defence to such an action. Accordingly, the information also falls within the absolute exemption for confidential information in section 41 of the Act.

19. For the same reasons, I have concluded that the environmental information within the disputed correspondence is exempt from disclosure under regulation 12(5)(f) and regulation 13 EIR:

(1) Disclosure of the information would adversely affect the interests of its provider (The Prince of Wales) for the purposes of regulation12(5)(f); the information satisfies the other conditions in the regulation; and the public interest is in favour of maintaining the exemption; and

(2) The information is exempt from disclosure under regulation 13 EIR (personal data) for the same reasons that non-environmental information within the correspondence is exempt from disclosure under section 40 of the Act.

Application of the criteria for use of the section 53 power

20. I have had regard to the Government's policy on use of the section 53 power in cases falling under section 35(1) of the Act, and I have applied to the present circumstances the principle within the policy that the power should be exercised only in exceptional cases. I am satisfied that this is such an exceptional case; and therefore merits the exercise of the power to make a certificate.

21. In my view, the criterion of exceptionality is properly satisfied in this case, in light of the following matters.

- The fact that the information in question consisted of private and confidential letters between The Prince of Wales and Ministers.
- The fact that the request in this case was for recent correspondence.
- The fact that the letters in this case formed part of The Prince of Wales' preparation for kingship.
- The potential damage that disclosure would do to the principle of The Prince of Wales' political neutrality, which could seriously undermine the Prince's ability to fulfil his duties when he becomes King.
- The ability of the Monarch to engage with the Government of the day whatever its political colour, and maintain political neutrality is a cornerstone of the UK's constitutional framework.

CONCLUSION

22. Having therefore taken into account all the circumstances of the case, I am satisfied that the public interest, at the time of the requests (and also at the present time) fell (and falls) in favour of non-disclosure. I am also satisfied that this is an exceptional case meriting use of the Ministerial veto to prevent disclosure and to safeguard the public interest.

23. The certificate I have signed has been provided to the Information Commissioner and copies will be laid before both Houses of Parliament. I have also provided a copy of this statement of reasons to the Information Commissioner and both Libraries of the Houses of Parliament, and copies will be available in the Vote Office.

A copy of the Government's policy in relation to the use of the power under section 53 of the Act as it relates to section 35(1) of the Act is annexed to this document.

RT HON DOMINIC GRIEVE QC MP
ATTORNEY GENERAL
16 October 2012